

**Cour
Pénale
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**International
Criminal
Court**

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No.: ICC-01/05-01/13
Date: 21 September 2015

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Public Redacted Document

with

Public Annex A and Confidential Annexes B to E

**Public redacted version of “Prosecution Request for the Admission of Previously
Recorded Testimony of P-0020, P-0243, P-0214 and P-0272, pursuant to Rule 68(3)”,
17 September 2015, ICC-01/05-01/13-1262-Conf**

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) requests Trial Chamber VII (“Chamber”), in accordance with rule 68(3) of the Rules of Procedure and Evidence (“Rules”) and paragraph 23 of the “Directions on the conduct of the proceedings” (“Directions”),¹ to conditionally admit the previously recorded testimony of P-0020, P-0243, P-0214 and P-0272, subject to fulfilment of the further conditions upon the witnesses’ appearance at trial (“First Request”). Should the Chamber grant the First Request, the Prosecution requests leave to conduct a limited examination-in-chief of these witnesses (“Second Request”).

2. Paragraph 23 of the Directions requires that the Parties file any application under rule 68(3) 21 days prior to the witness’ scheduled appearance. However, rule 68(3) posits a witness’ *actual* presence before the Chamber as a condition of admissibility of their previously recorded testimony.² Read in this light, paragraph 23 countenances the *conditional* admission of such evidence,³ which the Prosecution thus requests.

3. The previously recorded statements tendered⁴ comprise: (i) the audio recordings and/or transcripts of P-0020’s, P-0243’s and P-0272’s interviews taken pursuant to rule 112 of the Rules; (ii) a note reflecting the correction by P-0272 of two typographical errors in the transcript of his interview made during the certification

¹ ICC-01/05-01/13-1209.

² See rule 68(3) of the Rules: “if the witness [...] *is present* before the Trial Chamber” (italics added).

³ See e.g. ICC-01/04-01/07-2362, p.7: “**THE CHAMBER** [...] **ADMITS** into evidence the prior recorded testimony of P-0166 [...], *on the condition* that P-166 will appear before the Court” (emphasis in the original; italics added).

⁴ The term “previously recorded testimony” extends to statements and transcripts of interviews taken pursuant to rules 111 and 112 of the Rules, respectively, together with the associated exhibits. See ICC-01/05-01/08-1386, OA 5 OA 6, paras.79-81. See also ICC-01/09-01/11-1938-Red-Corr, paras.30-33, analysing the term “previously recorded testimony” in light of the Rules’ *travaux préparatoires*, the Court’s prior case-law and the need to ensure language consistency within the rule in interpreting it; ICC-01/05-01/08-2012-Red, para.136; ICC-01/05-01/08-886, para.6; ICC-01/04-01/06-1603, para.18; ICC-01/04-01/07-2289-Corr-Red, para.11; ICC-01/04-01/07-2362.

procedure; (iii) P-0214's original written statement taken pursuant to rule 112⁵ and its translation; and (iv) the video recording of P-0214's certification of his prior written statement (collectively, "Statements"). Annex A contains a list of the evidence registration numbers of the proposed material. Relevant transcripts of interviews and statements are attached at Annexes B to E.

4. The Statements are *prima facie* relevant to, and probative of, material issues at trial.

5. Granting the Requests would reduce the presentation of the Prosecution's examination-in-chief and help streamline the proceedings. Further, it would not unfairly prejudice the Defence, as the witnesses will be available for cross-examination.

II. Confidentiality

6. This filing is classified as "Confidential", as it refers to information that is not yet available to the public. The Prosecution will file a public redacted version.

III. Submissions

7. When admitting the written evidence of witnesses under the old rule 68(b),⁶ the Chambers have considered the following factors: (i) whether it would avoid the unnecessary repetition of the recorded evidence;⁷ (ii) whether it would reduce the trial's potentially excessive duration;⁸ (iii) whether a challenge to it is likely to be limited;⁹ (iv) whether the proposed material is of central significance to the case;¹⁰ (v)

⁵ P-0214 refused that his rule 112 interview be audio recorded, see CAR-OTP-0074-0872 at 0876. Thus, the procedure in rule 111 of the Rules was followed, in accordance with rule 112(1)(a).

⁶ Transformed into the current rule 68(3) without modifications.

⁷ ICC-01/04-01/06-1603, para.21.

⁸ *Ibid.*

⁹ *Ibid.*; ICC-01/04-01/07-2289-Corr-Red, para.14.

¹⁰ ICC-01/04-01/06-1603, para.21; ICC-01/04-01/07-2289-Corr-Red, para.14.

whether the proposed material is corroborative of other evidence;¹¹ (vi) whether it would affect the Accused's right to a fair trial.¹² In this case, all these factors, addressed below, favour the admission of the Statements.

A. The proposed evidence is *prima facie* relevant to the charges

8. P-0020, P-0243 and P-0214 are alleged to have falsely testified in the Main Case at the behest of Kilolo, including concerning the monies they received in relation to their testimony from, or on behalf of, the Bemba Defence team, and the number and/or nature of their contacts with its members.¹³

(i) P-0020 (D-57)

9. In the tendered interview, P-0020 admitted to the Prosecution that Kilolo had arranged a money transfer from Kinshasa to his wife immediately prior to his testimony.¹⁴ Western Union records confirm that on 16 October 2012 Babala sent USD 665 to P-0020's wife.¹⁵ P-0020 commenced his testimony on 17 October.¹⁶

10. P-0020 also admitted receiving another transfer from Kilolo in or around June 2012,¹⁷ similarly documented in the Prosecution's evidence.¹⁸

¹¹ ICC-01/04-01/06-1603, para.24; ICC-01/04-01/07-2289-Corr-Red, para.14.

¹² ICC-01/04-01/06-1603, para.22; ICC-01/04-01/07-2289-Corr-Red, para.14.

¹³ See e.g. ICC-01/05-01/13-1110-Conf, para.176 (P-0020); para.183 (P-0243) and para.192 (P-0214).

¹⁴ See e.g. CAR-OTP-0077-0088 at 0103, ln.515 – 0104, ln.549; at 0115, lns.943-944; CAR-OTP-0077-0121 at 0122, ln.20 – 0123, ln.48.

¹⁵ CAR-OTP-0073-0274, tab 31 Fidele Babala, row 14; CAR-OTP-0070-0004, tab 31 Fidele Babala, row 19.

¹⁶ See ICC-01/05-01/08-T-256-Red-ENG, 17 October 2012.

¹⁷ CAR-OTP-0077-0003 at 0010, lns.225-240; at 0011, lns.270-272.

¹⁸ See CAR-OTP-0070-0007, tab 32 A Musamba, row 23; CAR-OTP-0074-0855, tab 40 Aime Kilolo Musamba, row 52.

(ii) P-0243 (D-64)

11. Likewise, P-0243 admitted during his interview that on the day of his departure to The Hague his daughter received money, which in his opinion was sent on Kilolo's behalf in relation to his testimony in the Main Case.¹⁹ On 17 October 2012, Babala's driver [REDACTED] made two Western Union transfers to P-0243's daughter for a total of USD 700.²⁰ P-0243 also admitted having received money directly from Kilolo,²¹ which Western Union records corroborate.²²

(iii) P-0214 (D-55)

12. P-0214 admitted to the Prosecution that Kilolo had convinced him, through persistent phone calls and during a meeting organised to this effect in Amsterdam, to provide contrived testimony in the Main Case, including by promising Bemba's favour, as P-0214 was scared of Bemba and his supporters.²³

13. P-0214 also admitted that Kilolo arranged for him to speak with Bemba directly; the call data records show that this was a multi-party call involving the Detention Centre privileged line only intended for the counsel-client communications.²⁴

14. Upon Kilolo's instructions, P-0214 did not reveal this call or the Amsterdam meeting during his testimony.²⁵ Finally, in his statement, P-0214 admitted that Kilolo transferred him money *via* Western Union.²⁶

¹⁹ See e.g. CAR-OTP-0074-1169 at 1185, lns.583-586; CAR-OTP-0074-1189-R01 at 1191, lns.53-54; CAR-OTP-0074-1229-R01 at 1251, ln.810 – 1252, ln.861; at 1256, lns.986-988.

²⁰ [REDACTED].

²¹ CAR-OTP-0074-1169 at 1183, lns.492-494; CAR-OTP-0074-1201 at 1214, lns.270-273; CAR-OTP-0074-1229-R01 at 1244, lns.532-534; at 1251, lns.802-804; at 1253, lns.892-900.

²² See CAR-OTP-0070-0007, tab 32 A Musamba, row 24; CAR-OTP-0074-0855, tab 40 Aime Kilolo Musamba, row 53.

²³ CAR-OTP-0074-0872-R02 at 0878-0879, 0881.

²⁴ ICC-01/05-01/13-1110-Conf, para.190, fn.583.

²⁵ CAR-OTP-0074-0872-R02 at 0879-0880, 0881.

²⁶ CAR-OTP-0074-0872-R02 at 0880; see also CAR-OTP-0070-0007, tab 32 A Musamba, row 25.

(iv) P-0272

15. P-0272 is [REDACTED].²⁷ In the tendered statement, he admitted having made Western Union transfers [REDACTED], including to Kilolo and Mangenda.²⁸ The Prosecution's evidence shows that during the period of the charges²⁹ P-0272 sent money, among other persons, to Arido,³⁰ Kokate³¹ [REDACTED].³²

16. The evidence of P-0020, P-0243, P-0214 and P-0272, is thus relevant to, and probative of, contestable issues in the case, such as: (i) the alleged pattern of money transfers to witnesses through third parties; (ii) Bemba's, Kilolo's and Babala's respective roles in the Overall Strategy; (iii) the alleged consistent pattern of culpable conduct reflected in the charged incidents concerning the promises and/or monies received from, or on behalf of, the Bemba Defence; (iv) the alleged offences under articles 70(1)(a), (b) and (c) in respect of P-0020, P-0243 and P-0214. P-0214's evidence is further relevant to the alleged abuse by Kilolo and Bemba of the privileged Detention Centre line to effect unmonitored communications with witnesses.

B. The proposed evidence is *prima facie* probative and reliable

17. The Statements bear sufficient indicia of reliability and probative value for admission under rule 68(3) of the Rules. They were obtained by the Prosecution in the ordinary course of its investigations.³³ The witnesses provided them voluntarily,³⁴ in the language that they fully speak and understand or assisted by an interpreter,

²⁷ See CAR-OTP-0088-0188-R01 at 0202, lns.473-480; see also ICC-01/05-01/13-596-Conf-Corr2, para.27.

²⁸ CAR-OTP-0088-0188-R01 at 0209, lns.720-732; CAR-OTP-0088-0224-R01 at 0239, ln.539 – 0240, ln.547; lns.555-559; at 0241, lns.607-609; at 0243, lns.660-662; 666-667. See e.g. CAR-OTP-0070-0007, [REDACTED], rows 4, 9, 19 (Mangenda); rows 7-8, 11, 14-16 (Kilolo).

²⁹ ICC-01/05-01/13-749, p.47.

³⁰ See e.g. CAR-OTP-0070-0005, tab 1 Narcisse Arido, rows 72 (USD 100), 80 (USD 1264).

³¹ See e.g. CAR-OTP-0070-0005, tab 4 Joachim Kokate, row 99 (USD 1641.80).

³² [REDACTED].

³³ See ICC-01/09-01/11-1938-Red-Corr, para.66.

³⁴ For P-0243, see CAR-OTP-0074-1201 at 1202, lns.21-26; CAR-OTP-0074-1259 at 1263, lns.117-122; for P-0020, see CAR-OTP-0077-0026 at 0040, lns.500-503; for P-0272, see CAR-OTP-0088-0188-R01 at 0222, lns.1154-1158; CAR-OTP-0088-0249-R01 at 0271, lns.765-769; for P-0214, see CAR-OTP-0074-0872-R02 at 0876.

where necessary.³⁵ P-0243 and P-0272 exercised their right to counsel,³⁶ while P-0020 and P-0214 made an informed decision to waive such right.³⁷

18. P-0214 signed his statement³⁸ and subsequently acknowledged the truthfulness and accuracy of its contents to the [REDACTED] authorities.³⁹

19. P-0272 acknowledged to the Registry, in the presence of his two counsel, that the contents of his interview are true and correct to the best of his knowledge and belief, in accordance with rule 68(2)(b)(iii) of the Rules.⁴⁰

20. As noted, the Statements are corroborated by other evidence in the case, such as Western Union records, call data records, flight receipts disclosed by the Defence, and statements of other witnesses (*e.g.* P-0020's wife confirmed the money transfer).⁴¹

21. Finally, the proposed evidence is not materially in dispute. [REDACTED].⁴² [REDACTED],⁴³ [REDACTED]⁴⁴ [REDACTED],⁴⁵ [REDACTED],⁴⁶ [REDACTED].⁴⁷

³⁵ For P-0243, see CAR-OTP-0074-1091 at 1094, lns.80-94; for P-0020, see CAR-OTP-0077-0052 at 0055, ln.101 – 0056, ln.129; for P-0214, see CAR-OTP-0074-0872-R02 at 0876; for P-0272, see CAR-OTP-0088-0155-R01 at 0168, lns.433-450.

³⁶ For P-0243, see CAR-OTP-0074-1201 at 1203, lns.41-43; CAR-OTP-0074-1259 at 1263, lns.135-140; for P-0272, see CAR-OTP-0088-0188-R01 at 0222, lns.1170-1173; CAR-OTP-0088-0249-R01 at 0271, ln.791 – 0272, ln.796.

³⁷ For P-0214, see CAR-OTP-0074-0710 at 0710; see also CAR-OTP-0074-0872-R02 at 0874; for P-0020, see CAR-OTP-0077-0045 at 0049, ln.133 – 0051, ln.186; CAR-OTP-0077-0160 at 0161, lns.7-12; CAR-OTP-0077-0026 at 0041, ln.552 – at 0042, ln.570.

³⁸ CAR-OTP-0074-0860 at 0868.

³⁹ See CAR-OTP-0090-2036; CAR-OTP-0090-2037; CAR-OTP-0090-2038.

⁴⁰ ICC-01/05-01/13-1224-Conf, paras.4-6.

⁴¹ CAR-OTP-0074-0813 at 0816-0817, esp. paras.8-12.

⁴² ICC-01/05-01/13-596-Conf-Corr2, paras.20, 43, 82, 124, 148; ICC-01/05-01/13-671-Conf, para.56; ICC-01/05-01/13-600-Conf-Corr2, paras.326, 334.

⁴³ ICC-01/05-01/13-600-Conf-Corr2, para.325.

⁴⁴ *Ibid.*, para.335.

⁴⁵ *Ibid.*, para.340; fn.944.

⁴⁶ *Ibid.*, para.339.

⁴⁷ *Ibid.*, para.364.

C. Admitting the proposed evidence is in the interests of justice

22. Granting the First Request would foster judicial efficiency and economy. *First*, it would reduce the estimated duration of the Prosecution's case-in-chief.

23. *Second*, it would avoid the unnecessary repetition of the recorded evidence that is reliable, undisputed, and independently and fully corroborated.

24. *Third*, the Accused will suffer no unfair prejudice as a result of the admission of the Statements. They will have ample opportunity to cross-examine all the witnesses, whose prior evidence the Prosecution seeks to admit. Alternatively, even if there were prejudice, it would be minimal and substantially outweighed by the probative value of the material tendered.

D. A brief supplementary examination-in-chief of these witnesses is necessary and appropriate

25. By its terms, rule 68(3) allows the tendering party to examine the witness, whose previously recorded statement it seeks to admit.⁴⁸ Also, the Chambers of this Court have routinely authorised such practice.⁴⁹ In this case, a limited and focused examination-in-chief supplementing the Statements would be beneficial to the proper adjudication of salient issues arising from the charges.

⁴⁸ ICC-01/05-01/08-886, para.10.

⁴⁹ ICC-01/04-01/06-1603, para.25: "[T]he evidence of the two witnesses is to be presented by way of written statements, supplemented by any necessary questioning"; ICC-01/04-01/06-T-205-Red3, p.14, ln.16 - p.19, lns.9; supplementary questioning begins at ln.11. After admitting certain parts of P-0030's and P-0002's prior recorded testimony (for P-0030, see ICC-01/04-01/07-2233-Corr, paras.16-17; for P-0002, see ICC-01/04-01/07-2289-Corr-Red, p.17), Trial Chamber II allowed their supplementary questioning by the Prosecution (for P-0030, see ICC-01/04-01/07-T-176-Red-ENG CT from p.23; for P-0002, see ICC-01/04-01/07-T-184-Red-ENG CT from p.25).

IV. Relief Requested

26. For the foregoing reasons, the Prosecution requests the Chamber to conditionally admit the previously recorded testimony of P-0020, P-0243, P-0214 and P-0272, subject to the fulfilment of the further conditions of admissibility set out in rule 68(3). If the Chamber admits the Statements, the Chamber should grant the Prosecution leave to conduct a limited examination-in-chief of these witnesses.



Fatou Bensouda, Prosecutor

Dated this 21st Day of September 2015
At The Hague, The Netherlands